**Enforcement of EU Law Post-Brexit: What Are the Possible Scenarios?**

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**By Christian Dadomo and Noëlle Quénivet**

On 27 January 2017 Philip Hammond [admitted](http://www.independent.co.uk/news/uk/politics/uk-trade-negotiation-deal-us-brexit-european-union-member-philip-hammond-a7548641.html) that the UK was not allowed to negotiate trade agreements with the US until it had formally left the European Union (this is different from the situation of the UK having [declared](https://eulawpol57.wordpress.com/2017/02/06/enforcement-of-eu-law-post-brexit-what-are-the-possible-scenarios/uk.reuters.com/article/us-britain-eu-trade-idUKKBN15G46E) that it hoped to be able to adopt the EU’s free trade agreements after Brexit). This is indeed correct. Under Article 207 TFEU the Commission is responsible for negotiating treaties that fall within the competence of the EU. If the UK were to start such negotiations it would breach its treaty obligations.

Despite all the claims of various members of the UK government that dozens of States are lined up, ready to sign and ratify trade deals with the UK, the likelihood of the UK initiating such negotiations is rather minimal, at least in the next few months. Indeed, first, it appears that the UK lacks not only the required number of negotiators but also the expertise (see [here](https://www.theguardian.com/politics/2017/jan/05/uks-lack-of-negotiating-experience-may-lead-to-very-hard-brexit) and [here](https://www.ft.com/content/bbbdf998-4a6c-11e6-8d68-72e9211e86ab)). ‘Over the years, the EU members have lost considerable expertise in international trade law and have not concluded any trade agreements in their own right’ (Wessel, ‘[Editorial Comments: You Can Check Out any Time You Like, but Can you Really Leave?](https://www.utwente.nl/en/bms/pa/research/wessel/wessel116.pdf)’ (2016) 13(2) International Organizations Law Review, pages 8-9). In fact it is claimed that it does not even have enough negotiators for the Brexit which is its priority. How it could put together dozens of sets of negotiators together is a mystery. Second, the UK might be pencilling in trade agreements with other States clauses that might thwart their chances of obtaining from the EU the trade agreements it seeks (see Point 8 (‘Ensuring Free Trade with European Markets’) of the White Paper: [The United Kingdom’s Exit from and New Partnership with the European Union](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf), February 2017). It would thus be counterproductive and legally unwise for the UK to engage in negotiations with other States before first, agreeing on the withdrawal provisions and second, ascertaining its new relationship with the EU as this would necessarily lead to legal conflicts. After all, during divorce proceedings one is not allowed to marry someone else until one gets the decree absolute.

The UK might however, closer to the time of the withdrawal, initiate such trade negotiations. What would be the legal consequences for this breach of the treaty? Articles 258 and 260 TFEU envisage a procedure that involves the European Commission as well the Court of Justice of the European Union in ensuring compliance with States’ obligations under EU Law. As the Guardian of the Treaties (Article 17(1) TEU), the Commission could start the Article 258 TFEU procedure to address the infringement. The first step involves contacting the Member State and discussing the problem informally under the [EU Pilot Mechanism](http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm). Should the Member State not address the issue promptly and effectively, the Commission may start a formal infringement procedure which can be divided into two, pre-litigation and litigation phases, the latter being held before the Court of Justice of the European Union (Articles 258(2) and 260(1) TFEU). If the Court of Justice finds the Member State to have violated EU Law and the Member State subsequently fails to comply with the judgment the Commission can then apply to the CJEU for financial penalties to be imposed on the Member State (Article 260(2) TFEU).

The question is however whether the European Commission would start such proceedings. In 2001 the European Commission published a [White Paper](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52001DC0428) setting out situations that will be prioritised when deciding on which cases to pursue under Article 258 TFEU, amongst which feature ‘[c]ases that seriously affect the [Union] interest’. Undoubtedly the initiation of negotiations for trade agreements between the UK and non-EU Member States would affect the Union interests as such since it might prevent the Commission from negotiating trade deals with specific States. However, it must be remembered that there is no obligation for the Commission to launch proceedings. As the Court of First Instance explained ‘[t]he Commission is not bound to initiate an infringement procedure against a Member State; on the contrary, it has a discretionary power of assessment’ (*[Syndicat Departmental de Defense du Droit des Agriculteurs v Commission of the European Communities](http://curia.europa.eu/juris/showPdf.jsf?text=&docid=103850&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=628295)*, 12 November 1996, para 42). Given the sensitivity of the issue the Commission is likely to refrain from initiating the Article 258 TFEU procedure. That being said this does not prevent the Commission from trying to find a settlement with the UK and entering into informal talks.

Should the Commission engage the Article 258 TFEU procedure, it would first make discreet inquiries with the UK, giving it the opportunity to explain its position. Indeed, ‘the purpose of pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under [EU] aw and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission’ ([*Commission of the European Communities v Republic of Austria*](http://curia.europa.eu/juris/showPdf.jsf?text=&docid=59877&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=631434), 7 July 2005, para 22). Whether the UK would reply to this enquiry is everyone’s guess but bearing in mind that ‘[t]he UK is […] one of the most compliant Member States with respect to implementing and enforcing EU legal obligations’ (‘[Editorial Comments: “True is it that we Have Seen Better Days”](https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/publiekrecht/europees-recht/editorial-comments-cmlrev-2016-4.pdf)’ (2016) 53 Common Market Law Review 875, 878) one could expect the UK to cooperate. If the UK does not engage with the Commission, it would be in breach of the principle of sincere cooperation under Article 4(3) TEU for failing to comply with the Commission’s request for information ([*Commission of the European Communities v Hellenic Republic*](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61986CJ0240), 24 March 1988, paras 27-28) which would in fact be another ground to initiate Article 258 TEU proceedings. Again, the Commission is free to decide on which course to follow.

In light of the political nature of the issue the Commission is very unlikely to move onto the formal phase, ie the issuance of a reasoned opinion. Even if the Commission were to pursue the infringement procedure and eventually present the case to the Court of Justice of the European Union, the UK could refuse to take part in the court proceedings and ignore its judgment before its formal withdrawal of the EU.

Until the UK withdraws from the EU it must comply with both substantive EU Law and the enforcement procedure (ie take part in court proceedings, reply to the Commission’s enquiries, etc). Enforcing the enforcement procedure only works via the enforcement procedure (in case of failure to cooperate with the Commission) or the imposition of penalties (in case of failure to comply with the judgment) but again these could also be ignored by the UK, thereby resulting in a legal abysm with political consequences on both sides of the dispute.

The situation is even more complicated for proceedings brought under Article 258 TFEU but not yet concluded by the time the UK leaves the EU. Ford argues that ‘[i]nfringement proceedings by the Commission under Article 258 TFEU will […] cease, and the Commission will probably discontinue any existing infringement proceedings against the UK, given that the UK Government could simply ignore any judgment of the ECJ against it.’ (Michael Ford, ‘[The Effect of Brexit on Workers’ Rights](http://www.tandfonline.com/doi/full/10.1080/09615768.2016.1250477)’ (2016) 27(3) King’s Law Journal 398, 408). It might however be unwise for the UK to choose to ignore the European Commission and the CJEU completely as it would signal to the EU that the UK is not willing to conform to any (future) treaty obligations involving a supervisory mechanism despite its claims in the White Paper.

Nonetheless, after the UK withdraws from the EU, a number of legal issues will ‘dis-able’ the UK from adhering to the Article 258-260 infringement procedure. First, a key tenet of international law is that no enforcement procedure can be imposed upon a State without its consent. In other words, it will not be possible for the Commission or the Court to oblige the UK to take part in the procedure. Second, even if the UK were willing to defend itself before the CJEU it would have no legal standing. Whilst neither Article 19 TEU nor the [Statute of the Court of Justice of the European Union](http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf) list the parties that have legal standing it is hardly possible to envisage a non-EU Member State having access to the court (see eg Article 19 of the Statute that refers to Member States, institutions of the EU, EEA Member States, the EFTA Surveillance Authority and other parties. The latter are likely to be legal and physical persons).

Both situations are clearly unsatisfactory, for it would allow the UK to breach obligations it used to hold as a member of the EU under treaty law without being held responsible. After all, it is a principle of international law that ‘every internationally wrongful act of a State entails the international responsibility of that State’ (Article 1, International Law Commission, [Draft Articles on Responsibility of States for Internationally Wrongful Acts](http://legal.un.org/legislativeseries/documents/Book25/Book25_part1_ch1.pdf), 2001). This does not however mean that there is always an enforcement mechanism in place. Under international law, States are free to agree on whether such a mechanism is to be put into place and if yes, on its composition, powers and procedures.

To remedy this legal conundrum we propose that the withdrawal agreement under Article 50(2) TEU includes a compromissory clause or that a separate *compromis* be agreed upon with a view to dealing with all the juridical ‘leftovers’ of the divorce. (NB: The dispute resolution mechanisms proposed in the White Paper relate to the agreement on the relationship between the EU and the UK post Brexit (see Point 2 (‘Taking Control of our Own Laws’) of the White Paper: [The United Kingdom’s Exit from and New Partnership with the European Union](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf), February 2017)).

Two mechanisms could be envisaged:

1. An arbitration tribunal and/or commission that would not only deal with disputes resulting from the withdrawal agreement between the EU and the UK but also work as a clearing institution. This body could rule on *inter alia* the pending cases under Articles 267 (preliminary references and rulings) and 258-260 TFEU (enforcement proceedings). The establishment of a residual mechanism to complete the work of previous courts is not unknown in international law. For example, the cases pending before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda are being dealt with by the International Residual Mechanism for Criminal Tribunals (United Nations Security Council, [Resolution 1966](http://www.unmict.org/sites/default/files/documents/101222_sc_res1966_statute_en.pdf), 22 December 2010). On a different note, there is also a long history of using such arbitration tribunals/commissions to resolve claims on both sides (see eg [Iran-United States Claims Tribunal](http://www.iusct.net/), French-*Mexican* Claims Commission). The advantage of such a system is that it would provide legal certainty to physical and legal persons that currently hold rights and duties under EU Law. Also the costs would be borne by the parties to the specific dispute (ie the UK and the EU) which would avoid lengthy discussions on who pays for what. Moreover, the system would allow for the UK to remove itself from the jurisdiction of the CJEU which is one of its main Brexit demands (see Point 2 (‘Taking Control of our Own Laws’) of the White Paper: [The United Kingdom’s Exit from and New Partnership with the European Union](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf), February 2017). Arbitrators would also be appointed by both the UK and the EU.
2. Let the Court of Justice of the European Union continue its judicial work. The agreement would need to specify that the UK has legal standing before the CJEU and that it accepts the jurisdiction of the Court for cases that were still pending at the date of the withdrawal from the EU. The clear advantage of this solution is that it would ensure consistency in the interpretation of EU Law as well as uniformity in its application which is of importance even in the context of Brexit as the UK intends with the Great Repeal Bill to convert EU law into domestic law (see House of Commons Library, [Legislating for Brexit: The Great Repeal Bill](http://researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf), 21 November 2016). Both the principles of legal certainty and legitimate expectations would be complied with. The key impediment to this solution that would provide most protection to both individuals and companies is the unlikelihood of the UK to consent to the jurisdiction of the CJEU. As the White Paper specifies ‘[the UK] will bring an end to the jurisdiction of the CJEU in the UK.’ (Point 2.3, White Paper: [The United Kingdom’s Exit from and New Partnership with the European Union](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf), February 2017).

Whist we would favour the latter solution as it would be best to protect physical and legal persons involved in such disputes, we do not foresee the UK Government to agree with us. Having said that, considering that such a solution is temporary, *Realpolitik* might have the last word. In any respect, even if the UK favoured the first solution as it would allow the UK Government to save face, such arbitration tribunal/commission would still have to comply with and apply the jurisprudence of the Court of Justice of the European Union like the EFTA Court does since it would be inconceivable to depart from it without creating further conflicts.